STATE OF MICHIGAN

IN THE SUPREME COURT

MARLETTE AUTO WASH, LLC,	Supreme Court No. 153979
Plaintiff/Cross-Defendant/Appellant,	Court of Appeals No. 326486
v	Sanilac County Circuit No. 14-035490-CH
VAN DYKE SC PROPERTIES, LLC,	Hon. Donald A. Teeple
Defendant/Cross-Plaintiff/Appellee.	

BRIEF ON APPEAL – APPELLANT MARLETTE AUTO WASH, LLC
ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction to hear this appeal from the Court of Appeals' opinion and judgment entered on May 10, 2016 under MCR 7.303(B)(1). Plaintiff-Appellant Marlette Auto Wash LLC timely applied for leave to appeal on June 21, 2016. This Court granted leave to appeal on March 22, 2017.

QUESTION PRESENTED

Does open, notorious, adverse, and continuous use of property for at least fifteen years create a prescriptive easement that is an easement appurtenant, without regard to whether the dominant-estate owner took legal action to claim the easement?

The Sanilac County Circuit Court answered: Yes.

The Court of Appeals answered: No.

Appellant answers: Yes.

INTRODUCTION

For more than a quarter century, customers have accessed the Marlette Auto Wash through the adjacent parking lot owned by James Zyrowski's company, Defendant-Appellee Van Dyke SC Properties, LLC ("Van Dyke"). Before acquiring the parking lot in 2013, Mr. Zyrowski's other company, B&J Investments, owned the car wash for 16 years, and during that time openly, notoriously, adversely and continuously used that entrance. In fact, Mr. Zyrowski built four additional bays that left it as the *only* entrance. After selling the car wash in 2005 and then later purchasing the parking lot, Mr. Zyrowski threatened to block the access with trailers unless the new car wash owner, Plaintiff-Appellant Marlette Auto Wash, LLC ("Marlette"), paid $18,000 per year. This lawsuit ensued.

After a bench trial, the trial court entered a judgment that "as of 2005, the Car Wash property had the right to an easement." But Mr. Zyrowski persuaded the Court of Appeals to reverse and deny Marlette the same access that Mr. Zyrowski enjoyed for two reasons: (1) Mr. Zyrowski never took legal action to claim the easement before he conveyed the car wash, and (2) the use only exceeded the 15-year prescriptive period by 8 years at the time this lawsuit was filed. This Court should reverse the Court of Appeals and reinstate the trial court's decision.

A prescriptive easement serving as access to one's property is an easement appurtenant and therefore runs with the land, even if not mentioned in any deed. *Haab v Moorman*, 332 Mich 126, 143-144; 50 NW2d 856 (1952). This common-law rule is universally held across the country. Thus, if one of Marlette's predecessors, such as Zyrowski, acquired an easement by prescription, then so did Marlette. The central question, then, is whether Mr. Zyrowski (or his successor) satisfied the conditions for a prescriptive easement to vest. Ironically, the Court of Appeals resolved that question in Marlette's favor without even realizing it, when it acknowl-

edged that an easement vests upon expiration of the limitation period. There is no dispute on appeal that the 15-year prescriptive period expired before Marlette acquired the property. Thus, Marlette should enjoy the easement as an appurtenance to the car wash estate.

The Court of Appeals' theories that Mr. Zyrowski had to take legal action to claim the easement, or that the use had to *exceed* the prescriptive period by many years before Marlette could claim the easement, fly in the face of prescriptive easement doctrine. Until now, no court has ever required that the adverse user take legal action to claim the easement for it to vest and attach to the dominant estate. And every court to have addressed the point, including this one, has said that the easement ripens and runs with the land, when the prescriptive period expires. Adopting the Court of Appeals' additional requirements would not only conflict with this prior precedent. It would also distort the function of the court in adjudicating real property disputes and encourage needless litigation. The purpose of establishing clear rules of property law is to avoid disputes, not engender them. The court's role in adjudicating an easement dispute when it does arise is not to vest new rights, but to determine what rights have already vested and enforce them. For the sake of consistency with Michigan precedent, uniformity in the common law, and sound judicial policy, the Court should reject the Court of Appeals' "legal action" requirement.

STATEMENT OF FACTS

Plaintiff Marlette Auto Wash owns a car wash established in 1989, and its customers have used the adjacent shopping center parking lot for access ever since.

Appellant Marlette Auto Wash LLC ("Marlette") owns and operates a car wash at M-53/Main Street in Marlette, Michigan, which it purchased on March 30, 2007. Trial Ct Op 1, App 43a. The car wash property is bounded on the east by M-53/Main Street, *id*., on the north by Euclid Street, *id*. at 2, App 44a, on the west by a shopping center parking lot, *id*., and on the

south by the parking lot access drive, 11/20/14 Trial Tr 123, App 21a, also owned by the shopping center, *id*. Appellee Van Dyke SC Properties, LLC ("Van Dyke") owns the shopping center, which sells groceries and prescription medicine, and the parking lot. Trial Ct Op 1, App 43a. Van Dyke purchased the shopping center on May 22, 2013, *id*., after it lay vacant for several years, *id*. at 3, App 45a. For purposes of illustration, the Court may find it useful to see the layout of the property from the google map that is attached as Exhibit C to the application.

The car wash customers, including commercial trucks, use the parking lot to access the car wash, and have done so since the car wash was built in 1988. *Id*. at 2, App 44a. There is vehicular access to the property on the east side from M-53/Main Street, but customers can only enter the car wash bays from the shopping center's parking lot on the west side of the car wash property. *Id*. There is no express easement from the west property line of the car wash over the shopping center parking lot. *Id*. at 1, App 43a.

In early 1988, the car wash and shopping center properties were a single unimproved tract of land owned by Bernard and Evelyn Zyrowski. *Id*. at 2, App 44a. That year, the Zyrowskis conveyed the land to B&J Investment Company ("B&J"), a partnership of Bernard Zyrowski and James Zyrowski, which then split the tract into two separate parcels. *Id*. At around the same time, James Zyrowski, as contractor for B&J, applied for an excavation and building permit to construct the car wash. *Id*. In October of 1988, after construction on the car wash had begun, B&J sold the adjacent parcel to Marlette Development Corporation by land contract. *Id*. Customers began accessing the car wash from the west end of the single tract of land in 1989. *Id*. at 5, App 47a. In March 1990, the land contract was paid off, and a deed recorded, separating the parcel now used as a parking lot from the car wash property, under

separate ownership. *Id*. at 2, App 44a. No easements for ingress or egress through the Marlette Development Corp. property were created or reserved. *Id*.

In October of 1990, after the sale to Marlette Development Corporation, a Zorns IGA Food Market and Dollar General Store opened for business. 11/20/14 Trial Tr 64, App 5a. But the car wash customers continued to access the bays through the shopping center parking lot. Trial Ct Op 2-3, App 44a-45a; see, e.g., 11/20/14 Trial Tr 65-66, 68, App 6a-7a, 9a. For a while, customers could also access the car wash from a north access easement called Enterprise Drive (also referred to as Plaza Drive, 11/21/14 Trial Tr 23-24, App 26a-27a), which later became a public way called Euclid Street. Trial Ct Op 2, App 44a. But in 2000, the Village of Marlette closed that entrance, and B&J constructed four self-service car wash bays across the access on the northwest portion of the property, *id*., leaving the shopping center parking lot as the only access to the car wash bays, see *id*. at 1, App 43a.

B&J sold the car wash and property to Lipka Investments, LLC on April 12, 2005. Trial Ct Op 3, App 45a. At closing, Mr. Lipka asked Mr. Zyrowski how customers were to access the back (west) of the car wash. Mr. Zyrowski told him they had accessed it through the parking lot since the car wash opened and that the parking lot was owned by the "Marlette Business Group." 11/21/14 Trial Tr 6, App 24a. About one year after Lipka Investments purchased the car wash, it defaulted on its mortgage loan with Tri-County Bank. Trial Ct Op 3, App 45a. In lieu of foreclosure, Lipka Investments conveyed the car wash property to the bank on July 14, 2006. *Id*. Shortly thereafter, the bank conveyed the property to GLCW, LLC, a property-holding entity of the bank. *Id*. On September 28, 2006, GLCW entered into a lease agreement and purchase agreement with Appellant Marlette. *Id*.

Zyrowski, the car wash's original owner for 16 years, purchases the shopping center and threatens to cut off the only entrance to the car wash unless Marlette pays $18,000 per year.

Six years later, on or about May 22, 2013, Van Dyke—whose sole member is Mr. James Zyrowski, 11/21/14 Trial Tr 31, App 28a; Trial Ct Op 3, App 45a—acquired the vacant shopping center property from Marlette Development. Trial Ct Op 3, App 45a. The shopping center opened for business in November 2013. *Id.* "Van Dyke never owned the car wash property although Mr. Zyrowski had." *Id.* As soon as the shopping center opened, John Emery, an agent for Van Dyke, approached Marlette's owners, Stephen Kohler and Wayne Whiting, and demanded $1,500 per month ($18,000 per year) for maintenance, upkeep, insurance, and taxes on the parking lot, or else Van Dyke would park trailers along the back of its property. *Id.*; 11/20/14 Trial Tr 88-89, App 11a-12a (Kohler's testimony), 107-108, App 14a-15a (Whiting's testimony). This would have blocked the western access to Marlette's property. 11/20/14 Trial Tr 88, App 11a (Kohler's testimony), 116-118, App 18a-20a (Whiting's testimony).

Infuriated, "Mr. Kohler responded that it was 'bullshit,' considering the request as extortion." Trial Ct Op 3, App 45a. Mr. Whiting, the calmer one, stayed to negotiate, but there was no negotiation to be had with Van Dyke. 11/20/14 Trial Tr 89, 107-108, App 12a, 14a-15a.

Less than a month later, as Marlette's owners were investigating their options, a heavy snow fell. Trial Ct Op 3, App 45a. Without any communication with Van Dyke, Marlette Auto Wash pushed the snow from its car wash property onto the Van Dyke property. *Id.* Van Dyke then pushed the snow back to the eastern edge of the shopping center parking lot, blocking customers from entering the car wash via the shopping center. *Id.* at 4, App 46a. In a subsequent phone call, Mr. Emery said to Mr. Whiting, "you saw what we did with the snow," 11/20/14 Trial Tr 108, App 15a, to which Mr. Whiting responded, "we know what you're doing, now we're gonna have to do what we have to do." *Id.*

Shortly thereafter, Marlette filed this lawsuit, requesting injunctive relief and damages under theories of implied easement, easement by necessity, and/or a prescriptive easement. Trial Ct Op 4, App 46a. Van Dyke filed a Counter-Complaint, seeking compensation for the costs of upkeep, maintenance, and insurance. *Id.*

After a 2-day trial, the trial court holds that a prescriptive easement vested in 2005 when the statute of limitations expired, and that Van Dyke failed to show what costs Marlette should be responsible for.

At the end of closing arguments, Mr. Hearsch, counsel for Marlette, focused the court's attention on a disagreement between the parties over the law of prescriptive easements. 11/21/14 Trial Tr 76, App 29a. The parties disagreed about the significance of *Matthews v Department of Natural Resources*, 288 Mich App 23, 37; 792 NW2d 40 (2010). As Mr. Hearsch explained, "Mr. Keyes is arguing that *Matthews* stands for the position that you start in 2014 and go back and have to establish the 15 years. I believe what *Matthews* says is you start from the date the use started and go forward and when you hit the 15 years that is when the easement or prescriptive easement vests." 11/21/14 Trial Tr 76, App 29a.

After the 2-day trial, the Honorable Donald A. Teeple for the Sanilac County Circuit Court took the matter under advisement and issued a written opinion on December 3, 2014. Relying on *Matthews*, the court found, among other things, that a prescriptive easement benefiting the car wash had vested in 2005:

> It is the finding of this Court pursuant to *Matthews v Natural Resources Department*, 288 Mich App 23 (2010), that the plaintiff has shown privity of estate by taking on the possessory period of their predecessors-in-interest to achieve the necessary 15 year period. This commenced in 1989 and was completed in 2005. It is therefore the finding of this Court that as of 2005, the Car Wash property had the right to an easement for their customers to drive across the parking lot at various locations to enter the west end of the Car Wash. When Mr. Lipka purchased the property in 2005, there was a parol statement made by the seller of the Car Wash property, which is the same person who is now the defendant in

> this action, that the parking lot property was always used for ingress and egress to the Car Wash. This establishes an oral statement made at the time of a conveyance as required in *Matthews v Natural Resources Department*, *[v]onMeding v Strahl*, [319 Mich 598; 30 NW2d 363 (1948)] and *Killips v Mannisto*, 244 Mich App 259[; 624 NW2d 224 (2001)]. [Trial Ct Op 5-6, App 47a-48a (emphasis added).]

The court also ruled against Van Dyke on its counterclaim for unjust enrichment, for failure to show what expenses Marlette should be responsible for. *Id*. The evidence Van Dyke attempted to introduce was excluded because it was not given to Marlette during discovery. *Id*. Van Dyke appealed.

The Court of Appeals reverses, holding that the expiration of the limitation period during Zyrowski's ownership did not vest an easement because no claim was asserted.

On appeal, in support of the trial court's opinion, counsel for Marlette once again argued that (1) "[p]rivity need only be shown during the statutorily required possession period," (2) "the possessory period terminates 15 years after the possession commences regardless of when suit is commenced," and (3) "the owner of the property loses his title when the statute of limitation expires." Appellee's COA Br, Arg § I.D (page numbers not available). He relied this time not only on *Matthews*, but also *Gorte v Department of Transportation*, 202 Mich App 161, 168; 507 NW2d 797 (1993), which was cited in *Matthews*. *Id*.

The Court of Appeals reversed. After finding that Marlette was not in privity with the bank's property holding company, GLCW, for purposes of tacking, it turned to the argument that privity was not required because the prescriptive easement had already vested:

> Plaintiff argues, however, that previous owners of the car wash continuously used the parking lot for the 15–year period, and thus a prescriptive easement vested in the property to the benefit of all subsequent property owners regardless of the lack of privity. We disagree. <u>It is true that a prescriptive easement, like property acquired through adverse possession, vests when the statutory period expires and not when the action is brought. See [*Matthews*, 288</u>

> Mich App] at 36. However, the person claiming a prescriptive easement must acknowledge or act on the purported acquired right; "the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in *the party* claiming adverse possession." *Gorte v Dep't of Transp*, 202 Mich App 161, 168; 507 NW2d 797 (1993) (emphasis added). It is undisputed that no previous owner of the car wash asserted a claim of prescriptive easement with regard to defendant's property. [COA Op 3, App 52a (underscored emphasis added).]

Marlette's counsel argued that tacking was not required after the 15-year limitation period has run for a predecessor in title to the dominant estate because the servient estate owner "loses his title when the statute of limitation expires." COA Op 3, App 52a. But the Court rejected that argument as well, claiming it takes use much longer than the prescriptive period for this to occur:

> While a presumption of a prescriptive easement may arise when a party shows that the use has been "in excess of the prescriptive period by many years," *Reed v Soltys*, 106 Mich App 341, 346; 308 NW2d 201 (1981), no such presumption arose in this case. The car wash was built and originally owned by B & J Investment, a partnership of Zyrowski and his father, and was opened for business in 1989. Plaintiff purchased the property in 2007. Thus, even if defendant's parking lot had been used to access the car wash without permission and continuously, it had not been used "in excess of the prescriptive period by many years." See *id.* [COA Op 3, App 52a.]

Accordingly, the Court of Appeals reversed the trial court's finding that a "right to an easement for their customers to drive across the parking lot at various locations to enter the west end of the Car Wash" existed as of 2005.

This Court granted leave to appeal on the question of "whether open, notorious, adverse, and continuous use of property for at least fifteen years creates a prescriptive easement that is an easement appurtenant, without regard to whether the owner of the dominant estate took legal action to claim the easement." 3/22/17 MSC Order.

STANDARD OF REVIEW

Whether a prescriptive easement was created under the facts as found by the trial court, and whether it ran with the dominant estate without regard to whether legal action is taken to claim the easement, are questions of law reviewed de novo. See *People v Knight*, 473 Mich 324, 338; 701 NW2d 715 (2005) (holding that questions of law are reviewed de novo).

ARGUMENT

I. Fifteen years of open, notorious, adverse, and continuous use creates, by operation of law, a prescriptive easement that is appurtenant.

This Court's order granting leave encompasses two issues. The first and easiest to resolve is whether open, notorious, adverse, and continuous use of property for the prescriptive period creates an easement appurtenant. *Haab v Moorman*, 332 Mich 126; 50 NW2d 856 (1952), and many cases prior to it settled that question, establishing that it does. While prescriptive use could also, in theory, create an easement in gross, no party or *amici* in this case has disputed that, if Mr. Zyrowski created an easement by prescription, it would be an easement appurtenant.

The other issue—which lies at the crux of this appeal—is when does a prescriptive use fully ripen into a vested easement appurtenant? Does it vest by operation of law when the 15-year prescriptive period has run, or is legal action to claim the easement required unless the use has exceeded the prescriptive period by many years?

The Court should hold that a prescriptive easement vests by operation of law when the 15-year prescriptive period has run, for three reasons. First, this Court has indicated as much in many of its earlier rulings. Second, this Court has already applied this rule to prescription's closest cousin, adverse possession, holding that the owner's title is extinguished and legal title

vests in the adverse possessor when the limitation period has expired. And that holding is consistent with the general rule in Michigan that rights contingent on expiration of a limitation period vest when the limitation period has run. Finally, every court to have squarely addressed the issue has held that a prescriptive easement ripens into an easement appurtenant when the prescriptive period has run.

A. A prescriptive easement providing access to the user's property is an easement appurtenant and runs with the land.

"Title or rights in lands founded on prescription originate from the fact of actual, adverse, peaceable, open, and uninterrupted possession such length of time that the law presumes that the true owner, by his acquiescence, has granted the land, or interest in the land, so held adversely." *Turner v Hart*, 71 Mich 128, 138; 38 NW 890 (1888). Thus, it is said that the prescriptive ease-ment doctrine is "based upon the legal fiction of a lost grant." *Tolksdorf v Griffith*, 464 Mich 1, 4 n 2; 626 NW2d 163 (2001) (quoting 1 Cameron, Michigan Real Property Law, (2d ed) § 6.11, p 204). If an easement is based on a presumed grant, then it follows that such an easement would be treated much like an easement by express grant. See *Flanagan v Branton*, 224 Miss 214, 220; 79 So 2d 823 (1955) (holding that a prescriptive right to an easement is equivalent to a deed conveying such right).

Like express easements, prescriptive easements can be "in gross" or "appurtenant." See *Heydon v MediaOne*, 275 Mich App 267, 270; 739 NW2d 373 (2007) (recognizing a commercial easement in gross arose by prescription); *Smith v Dennedy*, 224 Mich 378, 383-384; 194 NW 998 (1923) (recognizing an easement appurtenant arose by prescription). "The principal distinc-tion between an easement proper, that is an easement appurtenant, and a right in gross is found in the fact that in the first there is and in the second there is not a dominant tenement." *Dennedy*, 224 Mich at 381 (quoting 19 C. J. 866). Easements in gross are personal in nature and they are

rare because there is a presumption against construing an easement as personal. When an easement can be construed as appurtenant to some estate, it "will not be presumed to be a personal right." *Collins v Stewart*, 302 Mich 1, 4; 4 NW2d 446 (1942). Easements acquired by prescription are construed as appurtenant when they are of no value except to be used in connection with another estate. *Dennedy*, 224 Mich at 383-384. A survey of the case law would reveal that this is almost always the situation, at least in Michigan.

This case is no exception. The right-of-way across the shopping center is of no value except as an access to the car wash property. It is therefore an easement appurtenant to that property.

"Where an easement is annexed as appurtenant to land either by grant or prescription, it passes as an appurtenance with a conveyance or devise of the dominant estate, although not specifically mentioned in the deed or will, or even without the use of the term 'appurtenances,' unless expressly reserved from the operation of the grant." *Myers v Spencer*, 318 Mich 155, 165; 27 NW2d 672 (1947) (*Greve v Caron*, 233 Mich 261, 265-266; 206 NW 334 (1925); see also *Wortman v Stafford*, 217 Mich 554, 560; 187 NW 326 (1922). Such easements run with the land because "[t]hey are incapable of existence separate and apart from the particular messuage or land to which they are annexed, there being nothing for them to act upon." *Dennedy*, 224 Mich at 381 (quoting 19 C. J. 865). "They are in the nature of covenants running with the land, attach to the land, to which they are appurtenant, and pass by deed of conveyance." *Id*. (quoting 19 C. J. 865).

For instance, in *Haab* the Court held that Plaintiff Peter Karson had a right to use a vacant alley to access his businesses in Ypsilanti because he acquired a prescriptive easement in

the alley from his predecessor by transfer of the dominant estate. 332 Mich at 129-130, 143-144. As the Court explained:

> One Adam Schaner . . . held the Karson parcels for more than 30 years and so established in his own name a valid easement without tacking. Once established, the right-of-way was an easement appurtenant and therefore passed by the deed of the dominant estate although not expressly mentioned in the instrument of transfer, and even without the word 'appurtenances.' [*Id*. at 143-144.]

The Court cited to numerous authorities on this point in *Haab*, leaving no room to argue over this rule of law. After all, "if an easement by prescription is equivalent to the conveyance of such right by deed, then it follows that such an easement will run with the land." *Logan v McGee*, 320 So 2d 792, 793 (Miss, 1975).

To the extent that the Court of Appeals opinion holds that an established prescriptive easement does not pass with conveyance of the dominant estate without "tacking" (a reference in a deed or a parole statement) or without legal action to claim it, this is error. *Haab* definitively established that no tacking and no legal action is required for it to run with the land once it has been established. *Haab* only leaves uncertainty as to whether the expiration of the prescriptive period alone establishes an easement by prescription or whether more time is required.

B. This Court has repeatedly indicated that a prescriptive easement is created by operation of law when the prescriptive period has run.

To the extent the Court of Appeals held that a prescriptive easement is "established" either by legal action to claim the easement or by prescriptive use many years beyond the limitation period, this too is incorrect. Easements are created in one of two ways. Either parties in writing manifest "a clear intent to create a servitude," what is called an "express easement," or the easement arises by operation of law. *Forge v Smith*, 458 Mich 198, 205, 211; 580 NW2d 876 (1998). A prescriptive easement is created by operation of law. See *id.*, 458 Mich at 211 n 38 (holding that no easement was created by operation of law because there was not 15 years of

prescriptive use).[1] To say it is created by "operation of law" does not mean it is created by judicial act or obtained by some other legal act to claim the easement. On the contrary, the term " 'operation of law' expresses devolution of a right absent the acts of a party . . . to obtain them." *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98, 113; 825 NW2d 329 (2012) (emphasis added).

With prescriptive easements, this Court's own decisions indicate that the easement is created by operation of law when the prescriptive period has run. The most explicit example is *Dennedy*, 224 Mich 378. Dennedy owned a "rooming house" with as many as 30 roomers or more who, through the entire period of July 26, 1904 to October 29, 1921 (17 years), used a private alley in the back. The owners of the alley sued Dennedy and others to quiet title and enjoin further use of the alley, arguing that the prescriptive easement along 10 feet of the alley for which Dennedy's predecessor had a judicial decree was an easement in gross and did not run with the land he deeded to Dennedy. 194 NW at 998, 1000. Alternatively, the plaintiffs argued if the easement was appurtenant, it only included the 10-foot strip, not the 28.4 foot strip. *Id*. at 1000. The Court rejected these arguments because "during the entire period occupants of the rooming house used this private alley without regard to whether their rooms were located on the 10-foot strip or the 28.40-foot strip [for which there was no judicial decree]." "The statutory period having run, the prescriptive easement ripened." *Id*.

While the question of whether the easement ran with the land is not at issue in *Dennedy*, that is beside the point. Whether the easement runs with the land is a function of what *type* of easement was created. Whether a prescriptive easement has ripened is a function of *when* an

[1] Easements created by operation of law also include "easements by necessity"—where property division creates a landlocked parcel—and implied easements—"where two or more tracts of property are created from a single tract, and the use of the servient estate for the benefit of the dominant estate is apparent, continuous, and necessary." *Forge v Smith*, 458 Mich 198, 211 n 38; 580 NW2d 876 (1998).

easement is created. The point here is that this Court has already said that a prescriptive easement is created when the statutory period has run. *Dennedy*, 194 NW at 1000; see also *Banach v Lawera*, 330 Mich 436, 439; 47 NW2d 679 (1951) ("In order to establish their right to the relief sought, the burden rested on the plaintiffs to show by satisfactory proof that the use of the driveway by their predecessors in title was of such character and continued for such length of time as to ripen into an easement by prescription."); *Sallan Jewelry Co v Bird*, 240 Mich 346, 348; 215 NW 349 (1927) ("[S]ince that time there has elapsed more than 15 years, a sufficient time to ripen the right into an easement by prescription.").

C. Consistency with the adverse possession doctrine calls for a prescriptive easement to "vest" when the 15-year period has run.

In addition to the Court's own pronouncements, there is another reason why the Court should hold that the expiration of the prescriptive period creates a prescriptive easement. Ever since *Turner v Hart*, 71 Mich 128, 137; 38 NW 890 (1888), this Court has looked to the limitation period for adverse possession to determine the length of time required to establish a prescriptive use. See, e.g., *Kitchen v Kitchen*, 465 Mich 654, 661 n 7; 641 NW2d 245 (2002) (noting that "the use did not continue for the fifteen-year period generally considered necessary to establish an easement by prescription" and citing MCL 600.5801(4)); *Forge*, 458 Mich at 211 n 38 ("A claim of prescriptive easement would fail because, at a minimum, plaintiff has failed to use lot 21 for the requisite fifteen-year prescriptive period. See MCL 600.5801."). Because the two doctrines look to the same statutory limitation period, the expiration of that limitation period should have the same effect under both doctrines.

As the Court of Appeals acknowledged in its opinion, under the adverse possession doctrine, "Michigan courts have followed the general rule that the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in the party claiming

adverse possession." *Gorte*, 202 Mich App at 168; accord *Gardner v Gardner*, 257 Mich 172, 176; 241 NW 179 (1932). A "vested" right is "an immediate fixed right of present or future enjoyment." *Cochrane v Bd of Ed of Mesick Consol Sch Dist*, 360 Mich 390, 412; 103 NW2d 569 (1960) (quoting with approval *Kissick v Garland Indep Sch Dist*, 330 SW2d 708, 712 (Tex App, 1959). It stands in contrast to a "contingent" or "expectant" right, which depends upon a condition that "may or may not happen." *Id.*; *Mount Clemens Sav Bank v State Land Office Bd*, 309 Mich 153, 157; 14 NW2d 817 (1944).[2] To say title has vested is to say that all rights to the property are enjoyed in full without any conditions or further legal acts required to obtain the right; upon vesting "the adverse possessor acquires 'legal title' to the property." *Beach v Twp of Lima*, 489 Mich 99, 106-107; 802 NW2d 1 (2011). "Thus, assuming all other elements have been established, one gains title by adverse possession when the period of limitation expires, not when an action regarding the title to the property is brought." *Gorte*, 202 Mich App at 168-169.

This rule is commensurate with the more general rule that "where a period of limitation has expired, the rights afforded by that statute are vested." *Gorte v Dep't of Transp*, 202 Mich App 161, 167; 507 NW2d 797 (1993); accord *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992) (emphasis added) ("There is no vested right in the running of a statute of limitation *except* when it has completely run and the action is barred."); accord *In re Straight's Estate*, 329 Mich 319, 325; 45 NW2d 300 (1951) (citing 34 Am Jur 37, Limitation of Actions § 33).

[2] For instance, "when title by the entireties comes to the spouses, each is vested with the entirety, with ownership of the whole, and with right of survivorship. Those interests and rights become fixed immediately upon vesting of title in them." *Budwit v Herr*, 339 Mich 265, 282; 63 NW2d 841 (1954). The inchoate right of dower, on the other hand, is "a contingent estate, which will become vested on the death of the husband." *Oades v Standard Sav & Loan Ass'n*, 257 Mich 469, 473; 241 NW 262, 263 (1932) (quoting *Bonfoey v Bonfoey*, 100 Mich 82, 85; 58 NW 620 (1894). Its existence depends on whether the husband dies first while they are still married. See also *Union Mut Aid Ass'n v Montgomery*, 70 Mich 587, 595; 38 NW 588 (1888) ("The right, which before was inchoate and contingent, becomes upon the death of the member fixed and certain in the beneficiary.").

For the sake of a coherent jurisprudence, the Court should continue to apply this same rule to prescriptive easements. See *Dennedy*, 194 NW at 1000. Keeping these related doctrines in harmony, as the Court has done for over a century by matching the limitation periods, promotes consistent application of these doctrines and minimizes confusion.

D. Every other Court to have considered the issue has concluded that the easement vests when the prescriptive period has run.

Not only is vesting upon running of the prescriptive period consistent with the Court's earlier pronouncements and with its adverse possession jurisprudence, it is also in line with every other jurisdiction in this country that has considered the issue. Multiple states have held that the running of the prescriptive period vests an easement appurtenant that runs with the dominant estate to successors. See, e.g., *Johnson v DeBusk Farm, Inc*, 272 Va 726, 730; 636 SE2d 388 (2006); *Fesperman v Grier*, 294 Ala 163, 166; 313 So 2d 525 (1975); *O'Connor v Brodie*, 153 Mont 129, 136; 454 P2d 920 (1969); *Clayton v Jensen*, 240 Md 337, 346; 214 A2d 154 (1965); *Cole v Bradbury*, 86 Me 380; 29 A 1097 (1894). And Marlette is not aware of any that have held otherwise.

In *Johnson*, the Supreme Court of Virginia held that a prescriptive easement was established before the current action, while the predecessors-in-title owned the dominant estate, upon completion of the 20-year prescriptive period. 272 Va at 730-731. While the Willis family owned the plaintiff's farm, from 1967 to 1999, the defendant's family, the Debusks, had used a farm road that crossed the Willises property to access their own farm. *Id*. at 728-730. Defendant DeBusk Farm, Inc., purchased the DeBusk farm in 1988 and plaintiff Johnson purchased the Willis farm in 1999. After reviewing evidence, the court found that during the thirty-three year period that the Willises owned the servient estate, "the farm road was openly and continuously used by the DeBusk family to cross the river," with knowledge of the Willises. *Id*. at 728.

Consequently, the court found that the prescriptive easement was established "at least 13 years before [the defendant] ever acquired her farm," i.e., in 1987, *exactly 20 years after the period of adverse use at issue began*. *Id*. at 730. Notably, Johnson's property was still subject to that easement after the dominant estate was conveyed to DeBusk Farms one year later. *Id*. at 731.

Fesperman, an Alabama case, involved a dispute over a driveway between two neighbors. The claimants argued that their predecessors in interest acquired a right to use the driveway and that it should pass with the land. 294 Ala. at 164. The Supreme Court of Alabama held that "easements appurtenant to land may be conveyed with a conveyance in land. Where an easement is annexed as an appurtenance to land by . . . prescription, it passes with a transfer of the land although not specifically mentioned in the instrument of transfer." *Id*. at 167. It found then found [t]here was ample evidence before the trial Judge in this case which would establish that the Griers through their predecessors in title, acquired the right of use of the driveway leading from the public street and running between the houses of the two parties *by virtue of its adverse use for a period of more than 20 years*." *Id*. (emphasis added).

In *O'Connor*, the main issue on appeal was whether the plaintiff's predecessors in interest acquired by prescription an "easement for the diversion and conveyance of water validly appropriated from the lands of the defendants." 153 Mont at 136. The Montana Supreme Court held that once prescriptive title is established through open, notorious, exclusive, adverse, continuous, and uninterrupted use of the easement for the full statutory period, it "is not divested by the subsequent transfer of the servient estate." *Id*. at 139.

The Maryland Supreme Court in *Clayton* involved a dispute over interference with a driveway. 240 Md at 338-340. The court held that since the testimony established that the easement by prescription existed for the required twenty year statutory period prior to the

transfer of the deed to the dominant tenement between the previous grantor and the claimants, "the appurtenant right passed to [the claimants] . . . ." *Clayton*, 240 Md at 346.

In *Cole*, the Supreme Court of Maine held that when an easement becomes appurtenant to a land parcel by prescription, the easement attaches to the estate and runs with the land regardless if it is mentioned in the deed or not. 29 A at 1097. The plaintiff sought to prevent the defendants from severing a supply pipe connecting an aqueduct and a water spring. *Id*. He claimed that the right to use the spring water was acquired by prescription by his predecessors in title, and passed to him as appurtenant to the premises. *Id*. The court held that the predecessor's 20 years of adverse use "matured" into an easement appurtenant that passed by deed to the estate.

> In the case at bar, it is unnecessary to consider whether Bartlett's interest, in 1852, had become legally attached to the estate, or whether it was only an inchoate prescriptive right at that date; for while the question is not entirely free from difficulty, there is, on the whole, a decided preponderance of evidence in favor of the plaintiffs' contention that after the deed to (Virgin) in 1853, there was an uninterrupted adverse enjoyment of the easement for more than twenty years, until the conveyance to Cole, in 1873, when, having matured in a legal right and become appurtenant to the estate, was passed by the deed to Cole. It is conceded that the Bartlett house received a supply of water from this aqueduct without interruption for thirty-nine years. [*Id.*]

These precedents hold to the common-law principle, reflected in this Court's own precedents, that a prescriptive easement is created and vests upon the expiring of the prescriptive period. There is no sound basis for departing from this universal principle. The Court of Appeals erred by imposing an additional requirement of legal action to claim the easement.

II. The Court should reverse the Court of Appeals and hold that Marlette acquired by deed a prescriptive easement created by Zyrowski's 15 years of open, notorious, adverse, and continuous use.

Based on the principles set forth above, it necessarily follows that Marlette acquired a vested right to an easement appurtenant through the parking lot by virtue of the deed it received from the bank. The trial court found that the land contract between B&J and Marlette Development Corporation was paid off in March 1990 and a deed recorded at that time. Trial Ct Op 2, App 44a; Trial Ex 10, App 30a-31a. With the parcels then under separate ownership, customers of the car wash continued to access the car wash bays across the adjacent shopping center parking lot for an additional 15 years of continuous and adverse use before B&J conveyed the property to Lipka on April 12, 2005. Trial Ct Op 3, App 45a; Trial Ex 19, App 33a-34a.

Consequently, the 15-year period of adverse use was satisfied even before B&J sold off the car wash. And even if for some reason the period of adverse use did not begin until later in the year 1990, Mr. Lipka's period of adverse use was tacked onto B&J's period by the oral representations Mr. Zyrowski made to Mr. Lipka about access through the parking lot. Trial Ct Op 5-6, App 47a-48a; 11/21/14 Trial Tr 6, App 24a. That extends the period to approximately September 2006, when Lipka conveyed the property by deed in lieu of foreclosure, Trial Ex 20, App 35a-42a, well more than 15 years after B&J's adverse use began in March 1990.

Because the prescriptive period had run either while Mr. Zyrowski owned the car wash or while Lipka did, the prescriptive easement "vested", "ripened," "matured," was "established"—however one would put it—before Lipka conveyed the car wash to the bank through a deed in lieu of foreclosure. As stated above, there is no question that the easement created in this instance was an easement appurtenant, since it was of no use except for the purpose of accessing the dominant car wash estate. As an easement appurtenant, it necessarily ran with the land in the

conveyances from Lipka to the bank, from the bank to GCLW, and from GCLW to Marlette. See Trial Ct Op 3, App 45a. The trial court correctly held that Marlette thereby acquired the easement appurtenant when it purchased the property. Trial Ct Op 5-6, App 47a-48a.

The Court of Appeals' reasons for reversing the trial court fail because they conflict with this Court's precedents and the common law of prescriptive easements. The court's first misstep was to equate prescriptive use doctrine with adverse possession law and overlook the fact that easements appurtenant run with the land. The Court of Appeals relied upon language from *Gorte*, an adverse possession case, stating that the expiration of the limitation period vests title in "the party claiming adverse possession." COA Op 3, App 52a. This is probably an oversimplification for an adverse possession case, but it is completely inapt in a prescriptive easement case.

While the elements to be satisfied for vesting title through adverse possession and vesting an easement through prescription are nearly identical, there is the key distinction between two interests once those rights are vested: title cannot be conveyed without reference in a deed while an easement can be. The Court made this abundantly clear in *Haab*, 332 Mich at 143-144. How can the claimant show he received title by conveyance if there is no expression of that intent? He cannot. The same is not true for prescriptive easements appurtenant because they are attached to the dominant estate. Privity of estate is established by the deed conveying the dominant estate. No expression of intent to convey the easement itself with the estate is required because the deed inherently conveys this appurtenance if not expressly excluded. *Myers*, 318 Mich at 166. The Court of Appeals' reliance on an adverse possession law is therefore sorely misplaced.

The Court of Appeals' second mistake was in failing to appreciate the significance of "vesting." The court acknowledges that a prescriptive easement vests when the prescriptive period has run, "and not when the action is brought," COA Op 3, App 52a, but then seems to hold that there is something more that must be done for easement to ripen into an easement appurtenant and run with the land. This paradox must be rejected.

The easement cannot be vested when the prescriptive period has run if there are contingencies that remain to be fulfilled before the right can be fully enjoyed. As explained above, vesting means the right is fixed and subject to immediate and full enjoyment. In the case of an easement appurtenant, that necessarily means the easement attaches as an appurtenance to the estate. Either an easement appurtenant exists and runs with the land, or no easement exists at all. If there are conditions left to be fulfilled before the easement becomes an appurtenance—such as legal action or extended prescriptive use—then the easement is a contingent right, not a vested right. As demonstrated above, to hold the easement is still contingent after the prescriptive period run is contrary to all authority.

Finally, the Court of Appeals completely misunderstood the presumption at issue in *Reed*, probably because *Reed* misstates the law. *Reed* acknowledges that a prescriptive easement is founded on a supposition of a grant, one that arises "from the open, notorious, continuous and adverse use across the land of another for a period of 15 years." 106 Mich App at 346. This rule has not changed since 1888. See *Turner*, 71 Mich at 138. *Reed* then goes on to say that, "when use has been in excess of the prescriptive period by many years, a presumption of a grant arises and the burden shifts to the servient estate owner to show that use was merely permissive." 106 Mich App at 346.

Contrary to what *Reed* says, the presumption that arises from many years of continuous use beyond the limitation period is not that of a grant but merely of adverse use. *Widmayer v Leonard*, 422 Mich 280, 289–90; 373 NW2d 538 (1985). *Reed* cites to *Haab* and *Beechler v Byerly*, 302 Mich 79, 83; 4 NW2d 475 (1942), but neither one asserts that the supposition of a grant only arises after many years of use beyond the limitation period. Instead, *Beechler* explains the rule as follows:

> It has been held that the open, notorious, continuous, and adverse use across the land of another from a residence or place of business to a public road for more than 20 years affords a conclusive presumption of a written grant of such way (*Clement v. Bettle*, 65 N.J.L. 675, 48 A. 567 [1901]), and that, when the passway has been used for something like a half century, it is unnecessary to show by positive testimony that the use was claimed as a matter of right, but that after such user the burden is on the plaintiff to show that the use was only permissive. [See, e.g., *Beechler*, 302 Mich at 83 (quoting *Berkey & Gay Furniture Co v Valley City Milling Co*, 194 Mich 234, 242; 160 NW 648 (1916)).]

This language shows that the conclusive presumption of a grant and the shifting burden of production are two different things. *Haab*, 332 Mich at 144 (citing *Beechler* and others for the proposition that after a quarter century of use, "the burden is on the plaintiff (sic) to show that the use was only permissive."). *Id.*

Though *Beechler* mentions 20 years for the presumption of a grant, notice the citation to a New Jersey opinion. Twenty years was the prescriptive period for New Jersey. *Kiernan v Kara*, 7 NJ Super 600, 602; 72 A2d 402 (1950) ("In order for a party to establish a right of way by prescription it is necessary that there be proved an open, continued, notorious and adverse user for twenty years."). In Michigan it is 15 years. *Turner*, 71 Mich at 138. If the presumption of a grant only arose after 20 years, then there would be no prescriptive easement until 20 years of prescriptive use. That is not the law in Michigan. *Kitchen*, 465 Mich at 661 n 7 ("We note that, in any event, the use did not continue for the fifteen-year period generally considered necessary to establish an easement by prescription.").

In short, the language quoted by the Court of Appeals from *Reed* intended to address a different presumption, one limited to proving the element of adversity. Is has nothing to do with when a prescriptive easement vests. It has only to do with who carries the burden of production at trial on the issue of adverse use. *Id.* This rule had no bearing on the issue before the Court of Appeals, since Van Dyke accepted on appeal the trial court's finding of 15 years of adverse use. See Trial Ct Op 5, App 47a. It was error for the Court of Appeals to rely on *Reed* to somehow hold that more than 15 years of open, notorious, adverse, and continuous use was required to establish an easement appurtenant by prescription.

CONCLUSION AND REQUESTED RELIEF

The only rule consistent with this Court's prior precedents and the common law of this country is that 15 years of open, notorious, adverse, and continuous vests an easement by prescription, and one that runs with the land unless the presumption of appurtenance is overcome. The Court should further hold that the right of a dominant estate owner and his successors is not contingent on any future event such as taking legal action to claim the easement or continued use of the easement well beyond the prescriptive period. Finally, the Court should hold that Mr. Zyrowski (or Lipka) created an easement appurtenant across the shopping center parking lot for the benefit of the car wash property through 15 years of open, notorious, adverse, and continuous use, and that Marlette acquired that prescriptive easement when it was deeded the car wash property. Accordingly, the Court of Appeals decision should be reversed and trial court's judgment reinstated.

Respectfully submitted,

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